DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-1377
Title: Nitro-Lift Technologies, L.L.C., Petitioner
v.
Eddie Lee Howard, et al.
Docketed: May 16, 2012
Lower Ct: Supreme Court of Oklahoma
Case Nos.: (109,003)
Decision Date: November 22, 2011
Rehearing Denied: February 13, 2012

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 14 2012	Petition for a writ of certiorari filed. (Response due June 15, 2012)
May 31 2012	Waiver of right of respondents Eddie Lee Howard, et al. to respond filed.
Jun 5 2012	DISTRIBUTED for Conference of June 21, 2012.
Jun 18 2012	Response Requested . (Due July 18, 2012)
Jun 29 2012	Order extending time to file response to petition to and including August 17, 2012.
Aug 15 2012	Brief of respondents Eddie Lee Howard, and Shane D. Schneider in opposition filed.
Aug 29 2012	DISTRIBUTED for Conference of September 24, 2012.
Aug 30 2012	Reply of petitioner Nitro-Lift Technologies, L.L.C. filed. (Distributed)
Sep 7 2012	Record Requested .
Sep 18 2012	Record received from Supreme Court of Oklahoma (1 envelope).
Sep 19 2012	Record received from District Court of Johnston County State of Oklahoma (1 envelope).
Sep 26 2012	DISTRIBUTED for Conference of October 12, 2012.
Oct 15 2012	DISTRIBUTED for Conference of October 26, 2012.
Oct 29 2012	DISTRIBUTED for Conference of November 2, 2012.
Nov 5 2012	DISTRIBUTED for Conference of November 9, 2012.
Nov 13 2012	DISTRIBUTED for Conference of November 20, 2012.
Nov 26 2012	Petition GRANTED. Judgment VACATED and case REMANDED. Opinion per curiam. (Detached Opinion)
Dec 28 2012	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

No. 11-1377

Supreme Court, U.S.
FILED
MAY 14 2012
OFFICE OF THE CLERK

In the Supreme Court of the United States

NITRO-LIFT TECHNOLOGIES, L.L.C.,
Petitioner,

v.

EDDIE LEE HOWARD and
SHANE D. SCHNEIDER,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of Oklahoma's holding that a state court may review an underlying employment agreement based upon a state statute restricting covenants not to compete, notwithstanding the presence of a valid arbitration clause, is foreclosed by the Federal Arbitration Act and 45 years of authority from this Court (particularly *Buckeye Check Cashing v. Cardegna*).

PARTIES TO THE PROCEEDING

Petitioner Nitro-Lift Technologies, L.L.C. was Defendant/Appellee in the Supreme Court of Oklahoma. Respondents Eddie Lee Howard and Shane D. Schneider were Plaintiffs/Appellants before that court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Nitro-Lift Technologies, L.L.C. states that it has no parent corporation and that no publicly traded company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Supreme Court of Oklahoma's decision is reported at 273 P.3d 20 (Okla. 2011), and reprinted in the Appendix ("App.") at 1a-26a. The Supreme Court of Oklahoma's decision denying Nitro-Lift's petition for clarification and/or rehearing is reprinted at 32a-33a. The unreported decision of the District Court of Johnston County, Oklahoma ("trial court") granting Nitro-Lift's motion to dismiss is reprinted at App. 29a-31a.

JURISDICTION

The Supreme Court of Oklahoma rendered its decision on November 22, 2011. App. 1a. Nitro-Lift's timely petition for rehearing and clarification was denied by that court on February 13, 2012. App. 32a. Sup. Ct. R. 13(2). This Court has jurisdiction under 28 U.S.C. § 1257(a). *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984).

CONSTITUTIONAL AND SATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, Art. VI, cl. 2, provides in pertinent part:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or

> Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

This case arises from the Supreme Court of Oklahoma's defiance of this Court's repeated holding that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 445-46 (2006). Forty-five years ago in *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395 (1967), the Court held that the FAA does not allow a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) was fraudulently induced. Instead, the *Prima Paint* Court held that such a claim must be decided by the arbitrator. The Court has not receded from this holding. *See, e.g., Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. __, ___, 130 S. Ct. 2772, 2778 (2010); *Preston v. Ferrer*, 552 U.S. 346, 349 (2008).

Nonetheless, in justifying its decision to ignore the arbitration clause and decide the validity of the agreement as a whole based on Oklahoma law, the Oklahoma court broadly held: **"We determine that the existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement."** App. 6a, 16a. (emphasis supplied). Emphasizing Oklahoma public policy, Respondents and the Supreme Court of Oklahoma maintain that because the underlying agreement was allegedly invalid under Oklahoma's statute restricting covenants not to compete in employment agreements, the state court had the power to ignore the arbitration agreement and apply the state statute. The state court did not base its decision on any infirmity in the arbitration clause itself.

The Oklahoma decision directly conflicts with this Court's precedents mandating that "questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court." *Preston*, 552 U.S. at 349; *see also AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986)("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims."). In essence, the Supreme Court of Oklahoma has crafted a rule based upon Oklahoma public policy that prohibits arbitration in disputes involving employment agreements containing covenants not to compete. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by

the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, __, 131 S. Ct. 1740, 1747 (2011).

Because the Oklahoma court's decision is irreconcilable with this Court's decisions in *Prima Paint, Buckeye Check Cashing*, and *Preston,* Nitro-Lift respectfully requests that the Court grant the petition for certiorari, summarily reverse the decision below, and remand for further proceedings not inconsistent with these precedents. *See, e.g., Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. __, 132 S. Ct. 1201 (2012) (per curiam) (summarily reversing enforcement of West Virginia statute barring arbitration in personal injury nursing home cases); *KPMG LLP v. Cocchi*, 565 U.S. __, 132 S.Ct. 23 (2011) (per curium) (summarily reversing enforcement of state court failure to address whether all claims were nonarbitrable); *Citizens Bank v. Alafabco*, 539 U.S. 52 (2003) (summarily reversing misapplication of this Court's FAA precedent). Alternatively, the Court should grant plenary review.

A. Factual Background

Petitioner Nitro-Lift is a Louisiana-incorporated company that provides energy companies with a service to stimulate the flow of hydrocarbons from a well. Oil or gas rises to the surface naturally for a time after a well is drilled. That natural lift inevitably slows or stops. Nitro-Lift contracts with the well operator to provide enhanced production using proprietary equipment and techniques to inject compressed gasses, such as nitrogen, into the well to reinvigorate production.

Nitro-Lift hired Petitioners Howard and Schneider at its office in Tishomingo, Oklahoma. App. 7a-8a. Both employees entered into and signed an identical Confidentiality/Non-Compete Agreement ("Agreement") that contains an arbitration provision stating:

> Any dispute, difference or unresolved question between Nitro-Lift and the Employee (collectively the "Disputing Parties") shall be settled by arbitration by a single arbitrator mutually agreeable to the Disputing Parties in an arbitration proceeding conducted in Houston, Texas in accordance with the rules existing at the date hereof of the American Arbitration Association.

App. 8a, 10a, n.9. The Agreement also contains a separate choice of law provision providing that the Agreement "shall, in all respects be subject to and be interpreted, construed and enforced in accordance with the laws in effect in the State of Louisiana, without regard to its conflict of laws principles." App. 10a, n. 9. (all caps in original). Respondents worked for Nitro-Lift on wells in at least Oklahoma, Texas, and Arkansas. *Plaintiffs' Application for Temporary Injunction Affidavit ¶ 5* (Oct. 14, 2010). Both respondents resigned their positions and took employment with a direct competitor of Nitro-Lift.

B. The Proceedings Below

Nitro-Lift served respondents with an arbitration demand in July 2010 alleging breach of the Agreement and seeking a decision prohibiting respondents from (1) disclosing or using Nitro-Lift's confidential

information; (2) inducing Nitro-Lift's employees to leave Nitro-Lift to work for its competitor; and (3) competing or interfering with Nito-Lift's business relationships or soliciting its customers. App. 9a.

After the arbitrator was selected and Nitro-Lift had advanced arbitration fees for all parties, respondents filed suit in state court on October 14, 2010. App. 11a. In their complaint, respondents sought an order declaring the Agreement null and void and an injunction prohibiting its enforcement. Id. On the same day they filed suit, respondents obtained an ex parte temporary restraining order enjoining Nitro-Lift from prosecuting the arbitration claims. Id. Thereafter, Nitro-Lift explained to the trial court that the complaint should be dismissed and respondents were not entitled to an injunction because respondents' merely challenged the validity of the underlying Agreement as opposed to the arbitration provision itself. *See Nitro-Lift's Response to Application for Temporary Restraining Order and Temporary Injunction, pp. 4-5* (Nov. 10, 2010); *Nitro-Lift's Motion to Dismiss, pp. 7-8* (Nov. 10, 2010). Citing this Court's authority in *Prima Paint* and *Southland*, Nitro-Lift argued that the validity of the non-compete Agreement must be decided by the arbitrator, not the court. Id. The trial court agreed, held the arbitration provision was valid on its face, dismissed respondents' complaint, and denied injunctive relief. App. 29a-31a.

Respondents appealed the trial court's decision. The appeal was to be heard under Oklahoma's accelerated appeal procedure, meaning the appellate court would render a decision without appellate briefing. Okla. Sup. Ct. R. 1.36. Respondents filed a

motion asking the Supreme Court of Oklahoma to retain the appeal, which the court granted. App. 11a.

The Supreme Court of Oklahoma then entered an order noting that the parties' filings in the trial court had not addressed 15 O.S. § 219A governing covenants not to compete. The court then directed the parties to "show cause why this matter should not be resolved by application of 15 O.S. 2001 § 219A." App. at 11a, 27a-28a. Respondents filed a brief arguing, in essence, that the underlying Agreement is invalid under Oklahoma public policy expressed in section 219A and the court, as opposed to the arbitrator, should decide the case based on the statutory language. *Appellants' Brief* (October 28, 2011). Nitro-Lift again argued that the arbitrator, not the court, must decide whether or to what extent the underlying Agreement violated section 219A. *Brief to Show Cause Regarding Application of 15 O.S. 2001 § 219A* (October 31, 2011).

On November 22, 2011, the Oklahoma court issued its unanimous opinion reversing the trial court's order dismissing the complaint and denying the temporary injunction of the arbitration proceedings. App. 1a-26a. The court made short shrift of the arbitration provision. The court broadly held: **"We determine that the existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement."** App. 6a (emphasis supplied). It then analyzed the underlying Agreement, not the arbitration provision, under section 219A and found it to be overbroad, invalid, and unenforceable.

Specifically, the court stated that "employers rely upon United States Supreme Court jurisprudence.

The employees assert that jurisdiction lies in this Court based on our pronouncements addressing the issue. We agree with employees." App. 13a. While the court did not undertake its own analysis of this Court's precedent, it found "most instructive" its prior analysis in *Bruner v. Timberlane Manor Ltd. P'ship*, 155 P.3d 16 (Okla. 2006), which the court characterized as containing an "exhaustive overview" of the Supreme Court's precedent, including *Prima Paint* and *Buckeye Check Cashing*. App. 14a-15a & n. 20. *Bruner* unanimously rejected the arbitration of a nursing home wrongful death claim under the FAA because it found that the transaction did not involve interstate commerce. Of course, *Bruner* is directly at odds with this Court's February decision in *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. __, 132 S. Ct. 1201 (2012) (per curiam), summarily rejecting nearly identical decisions from the Supreme Court of Appeals of West Virginia. Without even conducting the interstate commerce analysis of the obviously interstate facts of this case, the court in this case footnoted its reliance upon *Bruner's* secondary holding that the specific anti-arbitration provisions in the Oklahoma Nursing Home Care Act governed over "the more general statute favoring arbitration." App. 15a, n. 21. The court failed to identify any specific anti-arbitration provision in 15 O.S. § 219A similar to that contained in the act at issue in *Bruner* (and *Marmet)* or identify whether "the more general statute" being displaced by section 219A was the Oklahoma Uniform Arbitration Act (OUAA) or the FAA.

On December 12, 2011, Nitro-Lift petitioned for clarification and/or rehearing. It sought clarification of which general statute (the FAA or the OUAA) was being overridden by section 219A. It pointed out the

erroneous comparison of *Bruner's* analysis to this case and the fact that *Buckeye Check Cashing* directly prohibits state public policy as a basis for ignoring an arbitration clause. On February 13, 2012, the court denied the petition for clarification or rehearing. App. 32a.

This petition follows.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. Forty-Five Years Of Settled Supreme Court Precedent Forecloses Oklahoma's Rule That State Courts May Ignore An Arbitration Clause And Decide The Validity Of The Underlying Agreement Based On State Public Policy.

The rule adopted by Oklahoma allowing courts to review an underlying agreement's validity notwithstanding the presence of an arbitration clause defies this Court's settled precedent on the preemptive effect of the FAA, even in employment contracts. As initially set forth in *Prima Paint*, courts do not have authority to entertain a challenge to the validity of a contract that is not directed at "the making of the agreement to arbitrate . . ." 388 U.S. at 404. This is a matter of "federal substantive law of arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

Contrary to the decision of the Oklahoma court, the decisions in *Buckeye Check Cashing* and it progeny directly control this matter. In *Buckeye Check Cashing*, this Court rejected a Florida court's ruling that a court

rather than an arbitrator should resolve a claim that a contract is void under the state's usury laws. In so holding, this Court described the fundamental arbitrability rules established in *Prima Paint* and *Southland*:

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.
>
> * * *
>
> Applying them to this case, **we conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court.**

546 U.S. 445-46 (emphasis supplied). The Court specifically rejected the Florida court's reasoning that the arbitration agreement had to fall with the contract as a whole because the contract was void as a matter of state public policy. "[W]e cannot accept the Florida Supreme Court's conclusion that enforceability of the arbitration agreement should turn on "'Florida public policy and contract law.'" *Id.* at 446 (citations omitted).

The Court reiterated this holding in *Preston v. Ferrer*, 552 U.S. 346 (2008), where it considered whether a state rule requiring the exhaustion of administrative proceedings involving the validity of talent agent contracts required a stay of pending arbitration. This Court held that *Buckeye Check Cashing* clarified that "all disputes arising under [the parties'] contract, concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court. *Id.* at 349. The Court further reiterated that the FAA "declares a national policy favoring arbitration", which policy applied to the state courts and "forecloses state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 353 (citations omitted). Notwithstanding the public policy of California to regulate talent contracts, the Court held to its prior decisions and directed that "attacks on the validity of an entire contract, as distinct from attacks aimed at the arbitration clause, are within the arbitrator's ken." *Id.*

The Oklahoma court's broadly-stated rule allowing the review of the validity of underlying employment agreements containing an arbitration provision has also been expressly rejected by this Court. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Court reversed the holding of the United States Court of Appeals for the Ninth Circuit that all employment contracts were beyond the FAA's reach. There, the Court found that arbitration did not diminish the rights of employees, emphasizing that "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.'" *Id.* at 123 (quoting *Gilmer v.*

Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).

Later, although addressing the scope of an arbitration clause in an employment agreement, the Court confirmed that the severability principles of *Prima Paint* and *Buckeye Check Cashing* apply in the context of employment agreements. In *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. __, ___, 130 S. Ct. 2772 (2010), the plaintiff employee brought employment discrimination and retaliation claims under 42 U.S. § 1981. In its analysis of whether the claims were subject to the parties' arbitration agreement, the Court reaffirmed the general rule that courts may only hear challenges specifically aimed at the arbitration agreement and that challenges aimed at the agreement as a whole must go to the arbitrator. *Id.* at 2778. "Thus, a party's challenge to another provision of the contract, or to the contract as a whole does not prevent a court from enforcing a specific agreement to arbitrate." *Id.* "Thus, in an employment contract many elements of alleged unconscionability applicable to the entire contract (outrageously low wages, for example) would not affect the agreement to arbitrate alone. But, even where that is not the case – as in *Prima Paint* * * * -- we nonetheless require the basis of the challenge to be directed specifically to the agreement to arbitrate before the court will intervene." *Id.*

The Supreme Court of Oklahoma's refusal to submit to arbitration the validity of the Agreement under 15 O.S. § 219A conflicts with long-standing authority of this Court.

II. The Supreme Court Of Oklahoma Has Created A Rule Barring Arbitration Of An Entire Class Of Cases And Exhibits The Historical Hostility Toward Arbitration The FAA Was Designed To End.

The FAA was enacted to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002); *see also Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008). As a result, this Court repeatedly has granted review to strike down state rules prohibiting the arbitration of a particular type of claim. *See, e.g., Marmet Health Care Ctr.*, 132 S. Ct. at 1203-04 (FAA preempts state statutory bar to arbitration in nursing home injury cases); *Concepcion*, 131 S. Ct. at 1747 (FAA preempts state rule prohibiting class action waivers in arbitration agreements); *Preston*, 552 U.S. at 356 (FAA preempts state law granting state commissioner exclusive jurisdiction to decide issue the parties agreed to arbitrate); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (FAA preempts state law requiring courts to hear punitive damage claims); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (FAA preempts state law requirement that courts decide wage disputes); *Southland Corp.*, 465 U.S. at 10 (FAA preempts state statute prohibiting arbitration of claims under financial statute).

In bolded-text, the Supreme Court of Oklahoma illustrated its ongoing defiance of this Court's precedent and its clear intent to continue to do so in the future. The court stated:

> Our jurisprudence controls this issue. *Wyatt-Doyle & Butler Engineers, Inc. v. City of Eufala*, 2000 OK 74, 13 P.3d 474 held that the Uniform Arbitration Act . . . **did not prohibit this Court from reviewing a contract submitted to arbitration where one party asserted the underlying agreement was void and unenforceable.** In *Cardiovascular Surgical Specialists, Corp. v. Mammana*, 2002 OK 27, 61 P.3d 210, we relied on *Wyatt-Doyle* in determining that **an arbitrator's review of a contract would not prevent this Court from considering the contract's validity. Furthermore, we re-emphasized a principle first enunciated in *Wyatt-Doyle*, that the public right to be free from restraint of trade "cannot be waived by the parties' agreement to submit the issue of the validity of a contract provision to arbitration. A void provision provides no legal basis for enforcement whether through arbitration or judicial pronouncement." We reviewed an underlying employment contract** in *Thompson v. Bar-S Foods Co.*, 2007 OK 75, 174 P.3d 567 and **held that no arbitration was required where the agreement was not based on a valid contract.**

App. 14a. (emphasis in original opinion).

As the court did not reject the application of the FAA to this controversy (or even conduct an interstate commerce analysis), there can be no doubt it intends its holding to be a proclamation applicable to all arbitrable controversies in Oklahoma courts. Lest

there be any doubt, the court stated: "The **Supreme Court decisions** discussed therein [in *Bruner*],[1] and relied upon by Nitro-Lift here, **were found not to inhibit our review of the underlying contract's validity.**" App. 15a. (emphasis in original opinion).[2]

Here, where Oklahoma has created a per se rule allowing courts to decide the vaidity of employment

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[1] As discussed supra page 8, the Oklahoma court's primary reliance upon its own decision in *Bruner v. Timberlane Manor Ltd. P'ship* further highlights its hostility to arbitration. *Bruner* was summarily rejected by this Court in *Marmet Health Care Ctr.*, 132 S. Ct. 1203-04, when the Court struck down the application of a nearly identical West Virginia anti-arbitration provision. Equally important, the *Bruner* decision contained a detailed (although erroneous) discussion of whether the agreement involved interstate commerce. Yet, on the wholly distinguishable facts of this case, the court here did not even attempt such an analysis. Moreover, the court relied upon *Bruner* after an Oklahoma federal district court rejected the commerce clause analysis in *Bruner* and enjoined the state health care department from enforcing the anti-arbitration provision of that act. *See Rainbow Health Care Ctr. v. Crutcher*, 07-cv-194-IHP, 2008 WL 268321 at *6 (N.D. Okla. Jan. 29, 2008) (unpublished). Yet, the court in this case did not so much as mention that decision.

[2] In rejecting this Court's prior FAA authority, the Supreme Court of Oklahoma also relied upon its prior decision in *Cardiovascular Surgical Specialists, Corp. v. Mammana*, 61 P.3d 210 (Okla. 2003). There, the state court gave no deference to the arbitration award and found that it could independently review the validity of the underlying non-compete agreement. 61 P.3d at 212-13. While it was unclear whether the court was applying federal or state arbitration law, that decision was squarely at odds with this Court's decisions governing the limited judicial review of arbitration awards. *See, e.g., Major League Baseball Players Ass'n v. Garvery*, 532 U.S. 504, 509 (2001).

contracts in the first instance, the decision should be summarily reversed by this Court.

III. The Decision Below Is Exceptionally Important.

In recent Terms this Court has reaffirmed that state-law rules prohibiting arbitration of a class of cases are outright preempted by the FAA. In this case, the Supreme Court of Oklahoma has formulated and published a rule so broad it would allow the court to extend judicial review of an underlying agreement in any arbitrable case, especially employment disputes. Given its head-on conflict with this Court's simple, clear statements of the law, Oklahoma's rule is inconsistent with this Court's fundamental role in our judicial system. The Supremacy Clause mandates that "the Judges in every state shall be bound" by federal law. U.S. Const. Art. VI, cl. 2. "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312 (1994).

The threat that Oklahoma will apply its broad rule to cases beyond the covenant-not-to-compete context is bolstered by the state court's silence as to any limiting principle. Further, the state court's reliance on cases involving all manner of disputes shows that it does not intend to be bound by the facts of this case. Indeed, by relying primarily upon the *Bruner* nursing home injury case, it has exhibited a willingness to review underlying contracts containing arbitration agreements in any context whatsoever. It is important for this Court to put an end to Oklahoma's judicial

encroachment into areas clearly preempted by the FAA.

It is readily apparent that the Supreme Court of Oklahoma does not believe arbitrators can uphold Oklahoma law and public policy as well as Oklahoma courts. *See* App. 14a ("[T]he public right to be free from restraint of trade 'cannot be waived by the parties' agreement to submit the issue of the validity of a contract to arbitration.'") (citation omitted). The decision in this case is a prime example of the judicial hostility the FAA was designed to end. *Mastrobuono*, 514 U.S. at 56. Rather than fulfill the purposes of the FAA, Oklahoma's rule "will unnecessarily complicat[e] the law and breed[] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, 275 (1995).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

2011 OK 98

No. 109,003

[Filed November 22, 2011]

EDDIE LEE HOWARD and SHANE D. SCHNEIDER,	)
Plaintiffs/Appellants,	)
v.	)
NITRO-LIFT TECHNOLOGIES, L.L.C.,	)
Defendant/Appellee.	)

FOR OFFICIAL PUBLICATION

APPEAL FROM THE DISTRICT COURT OF JOHNSTON COUNTY

¶0 The plaintiffs/appellants, Eddie Lee Howard (Howard) and Shane D. Schneider (Schneider) (collectively, employees), both Oklahoma residents hired in Tishomingo, entered an employment contract

with the defendant/appellee, Nitro-Lift Technologies, L.L.C. (Nitro-Lift/employer). For two years following termination, the contract prohibits the employees from: working for, leasing to, or selling equipment to competitors; canvassing, soliciting, approaching, or enticing away any past or present Nitro-lift customer or supplier; and engaging, employing, soliciting, or contacting officers and employees of the employer with the intent to employ same. The contact contains an arbitration agreement requiring application of Louisiana law with disputes to be resolved in Houston, Texas. After the employees terminated their employment with Nitro-Lift, they went to work for a competitor in Arkansas. The employer filed an arbitration proceeding in Houston. Howard and Schneider filed an application for a declaratory judgment and injunctive relief in Johnston County asserting that the non-competition agreement violated public policy. The district court initially granted the employees a temporary injunction, prohibiting the employers from continuing the arbitration proceedings in Texas. Thereafter, the employer filed a motion to dismiss. After considering the parties' briefs and arguments, the district court found the arbitration clause to be valid on its face and reasonable in its terms, lifted the temporary restraining order, and granted the motion to dismiss. We hold that: 1) in conformance with our prior jurisprudence, the existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement; 2) as drafted, the non-competition covenants are void and unenforceable as against Oklahoma's public policy expressed by the Legislature's enactment of 15 O.S. 2001 §219A; and 3) judicial modification of the covenant not to compete is inappropriate where, as here, the contractual

provisions would have to be substantially excised, leaving only a shell of the original agreement, and would require the addition of at least one material term.

REVERSED AND REMANDED

Micah Knight — For Plaintiffs/Appellants,
Durant, Oklahoma

Kelli M. Masters, — For Defendant/Appellee.
Fellers, Snider, Blankenship
Bailey & Tippens,
Oklahoma City, Oklahoma

WATT, J:

¶1 Three issues[1] must be addressed to resolve this cause. They are whether: 1) the validity of the

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[1] The cause was retained to determine whether Oklahoma's public policy prohibited enforcement of an employment agreement providing that arbitration should take place in another jurisdiction with the application of yet a different state's law. Nevertheless, the cause's resolution on other grounds would render any statement on the issue an advisory opinion. See, *Ball v. Wilshire Ins. Co.*, 2007 OK 80, fn. 3, 184 P.3d 463; *Scott v. Peterson* 2005 OK 84, ¶27, 126 P.3d 1272; *City of Midwest City v. House of Realty, Inc.*, 2004 OK 56, fn. 14, 100 P.3d 678. All issues addressed herein are fairly comprised within the petition for declaratory judgment and injunctive relief filed in the district court on October 14, 2010 and within the Motion of Appellants that Appeal be Retained for Disposition by Supreme Court filed on December 14, 2010. *Burrell v. Burrell*, 2007 OK 47, fn. 10, 192 P.3d 286 [An argument need not be artfully drawn as long as it is fairly comprised within the pleadings presented to the trial court.] Furthermore, the parties were given the opportunity to address the effect of 15 O.S. 2001 §219A, see note 2, infra, on the non-competition provision by this Court's order of October 18, 2011. We note that in *Bakhsh v. JACRRC Enterprise, Inc.*, 1995 OK CIV APP 40, ¶9, 895 P.2d 746, the Court of Civil Appeals determined that a forum selection clause may be so unreasonable that it will be gravely difficult and inconvenient resulting in a party being deprived of a day in court. If so, it could be declared unenforceable. For the same proposition, see *M/S Bremen v. Zapata Off-Shore, Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). See generally, M. Rosenhouse, J.D., "Validity and Effect of Stipulation in Contract to Effect that It Shall Be Governed by Law of Particular State which is neither Place where Contract Is made nor Place Where It Is To Be Performed," 16 A.L.R.4th 967 (1982); F. Dougherty, J.D., "Validity of Contractual Provision Limiting Place or Court in which Action May Be Brought," 31 A.L.R.4th 404 (1984); and W. Heiser, "Forum Selection Clauses in State Courts: Limitations on Enforcement after Stewart and Carnival Cruise," 45 Fla.L.Rev. 361 (1993).

covenants not to compete should be resolved by the arbitrator or this Court; 2) the underlying covenant is void as against public policy pursuant to 15 O.S. 2001 §219A;[2] and 3) if so, can it be modified judicially to conform with the controlling statutory provision.[3]

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[2] Title 15 O.S. 2001 §219A providing:

> "A. A person who makes an agreement with an employer, whether in writing or verbally, not to compete with the employer after the employment relationship has been terminated, shall be permitted to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer.
>
> B. Any provision in a contract between an employer and an employee in conflict with the provisions of this section shall be void and unenforceable."

[3] *Id.* Prior to today's opinion, there have been only two non-precedential, distinguishable pronouncements on 15 O.S. 2001 §219A, see note 2, infra. The first came from the United States District Court in *Eakle v. Grinnell Corp.*, 272 F.Supp.2d 1304 (E.D.Okla. 2003). While the federal court refused to apply §219A retroactively, its assessment of the effect of the statute is consistent with our ruling today. The opinion provides in pertinent part:

> ". . . Initially, it is argued by Eakle that the NCA violates section 219A because of its duration, geographic restriction, and overall comprehensive nature of the prohibited activities. Eakle accurately points out that section 219A permits employees to enter into non-compete agreements with employers, but only to the extent 'the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the

¶2 We determine that the existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement. Our determination is supported by our prior jurisprudential pronouncements in: *Wyatt-Doyle & Butler Engineers, Inc. v. City of Eufaula,* 2000 OK 74, 13 P.3d 474; *Cardiovascular Surgical Specialists,*

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established customers of the former employer.' 15 O.S. §219A(A). Otherwise, the employee is 'permitted to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer.' *Id.* Admittedly, the NCA goes beyond section 219A(A)'s specific prohibition against the active solicitation of established customers by, among other things, precluding Eakle from owning, operating, or being employed by any similar business in competition with Grinnell. . . ."

Ingery Propane, LLC v. Lundy, 2009 OK CIV APP 8, 219 P.3d 547 involved a covenant not to compete executed in association with a sale of goodwill, a situation not presented here. In consideration for employment, Lundy signed a confidentiality and non-solicitation agreement protecting Inergy's customer information and lists, pricing, business strategies, and trade secrets. It also prohibited Lundy, for one year, from soliciting the hiring of Inergy employees, and, for two years, soliciting or diverting customers within fifty (50) miles of the company's business locations where Lundy had worked. The COCA determined, at least in some instances, the rule of reason would be applicable even under the confines of 15 O.S. 2001 §219A. It held that the statute addressed the balance of competitive effects under a rule of reason analysis finding the non-solicitation agreement enforceable. Pronouncement by an inferior federal court, although not binding of this Court, may have persuasive value. See, *Boswell v. Schultz, 2007 OK 94,* ¶15, 175 P.3d 390, *Medipour v. State ex rel. Dept. of Corrections*, 2004 OK 19, ¶18, 90 P.3d 546. Opinions released for publication by order of the Court of Civil Appeals are persuasive only and lack precedential effect. Rule 1.200, Supreme Court Rules, 12 O.S. 2001, Ch. 15, App. 1; 20 O.S. 2001 §§30.5 and 30.14.

Corp. v. Mammana, 2002 OK 27, 61 P.3d 210; *Thompson v. Bar-S Foods Co.*, 2007 OK 75, 174 P.3d 567; and *Bruner v. Timberlane Manor Ltd. Partnership*, 2006 OK 90, 155 P.3d 16.

¶3 As drafted, we hold that the non-competition covenants are void and unenforceable as against Oklahoma's public policy expressed by the Legislature's enactment of 15 O.S. 2001 §219A.[4] They contain provisions, for the period of two years, prohibiting: 1) employment with any oil or gas entity located in the United States and generating five percent (5%) of its gross revenues from nitrogen generation; 2) solicitation of any past or present Nitro-Lift customer or supplier; and 3) employing or soliciting employment of any Nitro-Lift officer or employee. Finally, we determine that judicial modification of the contractual provisions is inappropriate where, as here, the contractual provisions would have to be substantially rewritten to cure multiple defects.[5]

FACTS

¶4 Howard was hired by Nitro-Lift initially on August 18, 2008 at its offices in Tishomingo. At that time, Howard had approximately twenty (20) years' experience in the oil and gas industry. Due to a

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[4] Title 15 O.S. 2001 §219A, see note 2, supra.

[5] In reaching our decision today, we consider extant federal and state precedent. Nevertheless, our determinations rest squarely within Oklahoma law which provides bona fide, separate, adequate, and independent grounds for our decision. *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

dispute over hours worked, compensation paid, and time off, Howard quit in November of 2009. Approximately a month later, Nitro-Lift rehired him. Based on similar concerns to those he had in 2009, Howard again resigned in April of 2010.

¶5 In July of 2009, Nitro-Lift hired Schneider at its office in Tishomingo. The employee had prior experience in the oil field with Halliburton. Harboring complaints similar to those of Howard, Schneider quit on June 11, 2010.

¶6 Both employees signed confidentiality/non-compete agreements with Nitro-Lift at their hiring.[6] The agreements provide that neither employee, for a period of two (2) years following separation, will: be employed by any business involved in nitrogen generation[7] in the United States; solicit any past or present customer or supplier of the employer; or engage, employ, solicit, or contact any Nitro-Lift officer or employee for the purpose of recruiting the officer or employee for employment. They also bar the employees from loaning money to a business engaging in nitrogen generation and selling or leasing equipment to any person or company of like kind.

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[6] Although an employment agreement had been executed when he was originally hired, Howard alleges that no agreement was signed when he went back to work.

[7] The Confidentiality/Non-Compete agreement defines "nitrogen generation" as:

> ". . . the use of non-cryogenically generated nitrogen for applications on wellsites in the oil and gas industry in the United States . . ."

¶7 After July 8, 2010, Nitro-Lift served the employees with a demand for arbitration alleging that the employees had breached the non-compete agreement and should be ordered to refrain: a) from disclosing or using Nitro-Lift's confidential information; b) from inducing its employees to leave their employment with the company; and c) from competing or interfering with the employer's business relationships or soliciting its customers.[8] The

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[8] The confidentiality/non-compete agreements provide in pertinent part:

> ". . . k) In consideration of the receipt of Confidential Information during employment, the receipt of compensation, each element of compensation being hereby acknowledged by Employee as adequate, Employee hereby covenants and agrees that for two years from the date of separation from employment with Nitro-Lift, regardless of the reason or cause for separation, he will not directly or indirectly; [sic]
>
> i) own, manage, operate, join, control or participate in or be connected with (whether a director, officer, employee, agent, representative, partner, consultant or otherwise), or loan money to or sell or lease equipment to, any business or Person, which wholly or in any significant part, engages in Nitrogen Generation (as defined below) (a 'Competing Business') . . . The phrase 'Nitrogen Generation' means the use of non-cryogenically generated nitrogen for applications for wellsites [sic] in the oil and gas industry in the United States;
>
> ii) for purposes related to any Competing Business or about whom Employee has Confidential Information, canvass, solicit, approach or entice away or cause to be canvassed, solicited, approached or enticed away from Nitro-Lift or its Affiliates any Person who or which is a past or present customer or supplier of Nitro-Lift or any

agreement calls for the application of Louisiana law in an arbitration proceeding to be conducted in Houston, Texas.[9]

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of its Affiliates, or cause any such Person to curtail or cancel its business with Nitro-Lift or its Affiliates; or

iii) engage or employ, or solicit or contact with a view to the engagement or employment of any Person who is an officer or employee of Nitro-Lift or any of its Affiliates, or induce or attempt to influence any such Person to terminate his or her employment.

The parties agree and acknowledge that the limitations as to time, geographical area and scope of activity to be restrained as set forth in Section 4(k) are reasonable and do not impose any greater restraint than is necessary to protect the legitimate business interests of Nitro-Lift. To the extent that any part of this Section 4(k) may be invalid, illegal or unenforceable for any reason, it is intended that such part shall be enforceable to the extent that a court of competent jurisdiction shall determine that such part, if more limited in scope, would have been enforceable, and such part shall be deemed to have been so written and the remaining parts shall as written be effective and enforceable in all events."

[9] The confidentiality/non-compete agreements provide in pertinent part:

". . . ARBITRATION

a)Any dispute, difference or unresolved question between Nitro-Lift and the Employee (collectively, the 'Disputing Parties') shall be settled by arbitration by a single arbitrator mutually agreeable to the Disputing Parties in an arbitration proceeding conducted in Houston, Texas . . .

CONSTRUCTION

THIS AGREEMENT SHALL, IN ALL RESPECTS, BE SUBJECT TO AND INTERPRETED, CONSTRUED AND

¶8 The instant cause arises out of the employee's petition for declaratory judgment and injunctive relief filed in the District Court of Johnston County on October 14, 2010. The employees sought judgment declaring the non-compete agreement null and void and enjoining enforcement of the same. The district court granted the employees a temporary restraining order pending a hearing. On November 9, 2010, Nitro-Lift filed a motion to dismiss. The cause was heard on November 23, 2010. An order issued that same day in which the district court found the arbitration agreement to be valid on its face and reasonable in its terms and scope. Nitro-Lift's motion to dismiss was granted. The district court denied the employees' motion for a stay pending appeal filed on December 2, 2010. We also declined to issue a stay. However, we granted the employees' motion to retain the cause on January 19, 2011.

¶9 On October 18, 2011, we issued a show cause order directing the parties to address the effect of 15 O.S. 2001 §219A on the cause. Briefs were filed on October 28th and October 31st by the employees and the employer, respectively.

ENFORCED IN ACCORDANCE WITH THE LAWS IN EFFECT IN THE STATE OF LOUISIANA, WITHOUT REGARD TO ITS CONFLICT OF LAWS PRINCIPLES. . . " [Emphasis in original.]

Standard of Review[10]

¶10 In Oklahoma, the rules governing appellate review in regard to injunctive relief are settled. Matters involving the granting or denying of injunctive relief are of equitable concern.[11] A judgment issuing or refusing to issue an injunction will not be disturbed on appeal unless the lower court has abused its discretion or the decision is clearly against the weight of the evidence.[12] An abuse of discretion occurs when a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling.[13] Nevertheless, this Court is not bound by the findings or reasoning of the lower court. Rather, we independently consider, weigh, and examine the evidence.[14]

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[10] No one alleges that the contractual language is ambiguous. Therefore, it is subject to interpretation as a matter of law. *Pitco Prod. Co. v. Chaparral Energy, Inc.*, 2003 OK 5, ¶12, 63 P.3d 541; *Mercury Inv. Co. v. F.W. Woolworth Co.*, 1985 OK 38, ¶9, 706 P.2d 523; *Walker v. Telex Corp.*, 1978 OK 13, ¶7, 583 P.2d 482.

[11] *Sharp v. 251st Street Landfill, Inc.*, 1996 OK 109, ¶5, 925 P.2d 546; *Jackson v. Williams*, 1985 OK 103, ¶9, 714 P.2d 1017.

[12] *Brown v. Oklahoma Secondary School Activities*, 2005 OK 88, ¶11, 125 P.3d 1219; *Johnson v. Ward*, 1975 OK 129, ¶42, 541 P.2d 182; *Bartlesville.v. Ambler*, 1971 OK 154, ¶24, 499 P.2d 433.

[13] *Matter of BTW*, 2008 OK 80, ¶20, 195 P.3d 896; *Spencer v. Oklahoma Gas & Elec. Co.*, 2007 OK 76, ¶13, 171 P.3d 890; *Fent v. Oklahoma Natural Gas Co.*, 2001 OK 35, ¶12, 27 P.3d 477.

[14] *Sharp v. 251st Street Landfill, Inc.*, see note 11, supra, *Jackson v. Williams*, see note 11, supra; *Public Serv. Co. of Oklahoma v. Home Builders Ass'n of Realtors, Inc.*, 1976 OK 120 ¶5, 554 P.2d 1181.

¶11 We remain mindful that injunctions are extraordinary remedies that should not be lightly granted.[15] Entitlement to injunctive relief must be established by clear and convincing evidence and the nature of the complained of injury must not be nominal, theoretical, or speculative.[16] Nevertheless, the question of the existence of a viable, enforceable agreement to arbitrate is a question of law which this Court reviews *de novo*.[17]

¶12 a) Oklahoma case law supports a determination that the existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement.

¶13 Nitro-Lift argues that the issue of the validity of the covenants not to compete is for the arbitrator. In doing so, the employers rely upon United States Supreme Court jurisprudence. The employees assert that jurisdiction lies in this Court based on our pronouncements addressing the issue. We agree with the employees.

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[15] *Sharp v. 251st St. Landfill, Inc.*, see note 11, supra; *Jackson v. Williams*, see note 11, supra; *Amoco Prod. Co. v. Lindley*, 1980 OK 6, ¶50, 609 P.2d 733.

[16] *Daffin v. State ex rel. Oklahoma Dept. of Mines*, 2011 OK 22, ¶7, 251 P.3d 741; *House of Realty v. City of Midwest City*, 2004 OK 97, 109 P.3d 314 citing *Sharp v. 251st St. Landfill, Inc.*, see note 11, supra.

[17] *Oklahoma Oncology & Hematology v. US Oncology, Inc.*, see note 22, infra; *Rogers v. Dell Computer Corp.*, see note 22, infra.

¶14 Our jurisprudence controls this issue.[18] *Wyatt-Doyle & Butler Engineers, Inc. v. City of Eufaula*, 2000 OK 74, 13 P.3d 474 held that the Uniform Arbitration Act, 12 O.S. Supp. 2006 §1851, *et seq.*[19] ***did not prohibit this Court from reviewing a contract submitted to arbitration where one party asserted that the underlying agreement was void and unenforceable.*** In *Cardiovascular Surgical Specialists, Corp. v. Mammana*, 2002 OK 27, 61 P.3d 210, we relied on *Wyatt-Doyle*, in determining that **an arbitrator's review of a contract would not prevent this Court from considering the contract's validity. Furthermore, we re-emphasized a principle first enunciated in *Wyatt-Doyle*, that the public right to be free from restraint of trade 'cannot be waived by the parties' agreement to submit the issue of the validity of a contract provision to arbitration. A void provision provides no legal basis for enforcement whether through arbitration or judicial pronouncement." We reviewed an underlying employment contract** in *Thompson v. Bar-S Foods Co.*, 2007 OK 75, 174 P.3d 567 and **held that no arbitration was required where the agreement was not based on a valid contract.**

¶15 Most instructive on Nitro-Lift's arguments is *Bruner v. Timberlane Manor Ltd. Partnerhship*, 2006 OK 90, 155 P.3d 16. *Bruner* contains an exhaustive overview of the United States Supreme Court decisions

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[18] *Oliver v. Omnicare, Inc.*, see note 22, infra.

[19] The Oklahoma Uniform Arbitration Act, codified at 15 O.S. 2001 §§801, *et seq.* was recodified at 12 O.S. Supp. 2006, §§1851, *et seq.*, effective January 1, 2006. 2005 Okla. Sess. Laws, ch. 364.

construing the Federal Arbitration Act (Federal Act), 9 U.S.C. §§1, *et seq.* and state arbitration law.[20] The **Supreme Court decisions** discussed therein, and relied upon by Nitro-Lift here, **were found not to inhibit our review of the underlying contract's validity.**[21]

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[20] Among the cases discussed are three Supreme Court cases on which the employers rely: *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 338 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006); and *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). *Prima Paint* held that a federal court was free to decide issues relating to the making and performance of an arbitration agreement, but matters concerning the making of the contract containing the arbitration agreement were for the arbitrator. *Buckeye* reaffirmed these principals. *Southland* held that the Federal Act withdrew from the states the power to require a judicial forum for the resolution of disputes which the contracting parties agreed to resolve by arbitration.

[21] We acknowledged in *Bruner v. Timberlane Manor Ltd. Partnership*, 2006 OK 90, 155 P.3d 16, that the United States Supreme Court had determined that the Federal Arbitration Act preempted and displaced state anti-arbitration statutes. Nevertheless, relying on the well established principle in Oklahoma law that where two statutes address the same subject, one specific and one general, the specific will govern over the general, we held that the specific statute in the Nursing Home Care Act addressing the right to commence an action and to have a jury trial would govern over the more general statute favoring arbitration. Here, we are presented with similar circumstances to those encountered in *Bruner*, this note, supra. The Oklahoma Legislature has enacted a specific statute addressing non-competition agreements. Title 15 O.S. 2001 §219A, see note 2, supra, addresses the question of the validity of the covenant at issue. Here, as in *Bruner*, this note, supra, the more specific statute, 15 O.S. 2001 §219A, see note 2, supra, addressing the validity of covenants not to compete, must govern over the more general statute favoring arbitration.

¶16 Nitro-Lift's attempts to distinguish the cases discussed above are unpersuasive. We hold that the existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement. Our determination is supported by our prior jurisprudential pronouncements in: *Wyatt-Doyle & Butler Engineers, Inc. v. City of Eufaula*, 2000 OK 74, 13 P.3d 474; *Cardiovascular Surgical Specialists, Corp. v. Mammana*, 2002 OK 27, 61 P.3d 210; *Thompson v. Bar-S Foods Co.*, 2007 OK 75, 174 P.3d 567; and *Bruner v. Timberlane Manor Ltd. Partnership*, 2006 OK 90, 155 P.3d 16.[22]

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[22] See also, *Oklahoma Oncology & Hematology v. US Oncology, Inc.*, 2007 OK 12, ¶19, 160 P.3d 936 [The existence of valid, enforceable agreements to arbitrate is a question of law to be reviewed by this Court *de novo*.]; *Rogers v. Dell Computer Corp.*, 2005 OK 51, ¶14, 138 P.3d 826 [Acknowledging that, under the Federal Arbitration Act, when an arbitration provision affects interstate commerce, the question of the contract's validity as a whole must be submitted to the arbitrator. Nevertheless, even though we were prohibited by federal law from examining the validity of the contract as a whole, we were not constrained from treating the contract as valid and analyzing the arbitration provision.]; *Oliver v. Omincare, Inc.*, 2004 OK CIV APP 93, ¶5, 103 P.3d 626 [The question of whether a covenant not to compete or non-competition provision is contrary to public policy is a question of law for the court.]; *Loewen Group Acquisition Corp. v. Matthews*, 2000 OK CIV APP 109, ¶13, 12 P.3d 977 [To the same effect.].

¶17 b) As drafted, the covenants are void and enforceable as against Oklahoma's public policy expressed through legislative mandate in 15 O.S. 2001 §219A.

¶18 Nitro-Lift argues that the covenants not to compete are reasonable and necessary to protect the confidential information and technical knowledge imparted to the employees during training. The employer asserts that the covenants should be enforced as a necessary step in protecting Nitro-Lift in the marketplace. The employees contend that they received no confidential information during their employment with Nitro-Lift and that the non-compete provisions of the employment contract are void[23] as a matter of law pursuant to 15 O.S. 2001 §217.[24] Based on the Legislature's more precise statement on the matter of the enforceable parameters of a contract between an employer and an employee containing a

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[23] A void contract is one that is illegal or contrary to public policy. *Kincaid v. Black Angus Motel, Inc.*, 1999 OK 54, ¶7, 983 P.2d 1016, *Maryland Casualty Co. v. De Armon*, 1937 OK 45, ¶0, 64 P.2d 719. A contract made in violation of a statute is void. *Kincaid v. Black Angus Motel, Inc.*, this note, supra; *Missouri Fidelity & Casualty Co. v. Scott & Scott*, 1918 OK 658, ¶0, 178 P. 122.

[24] Title 15 O.S. 2001 §217 providing:

> "Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by Sections 218 and 219 of this title, or otherwise than as provided by Section 2 of this act, is to that extent void."

covenant not to complete in 12 O.S. Supp. 2006 §219A,[25] we agree.[26]

¶19 The primary goal of statutory interpretation is to ascertain and, if possible, give effect to the intention and purpose of the Legislature as expressed by the statutory language.[27] Intent is ascertained from the whole act in light of its general purpose and objective[28] considering relevant provisions together to give full force and effect to each.[29] The Court presumes that the Legislature expressed its intent and that it intended

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[25] We take judicial notice of applicable statutory provisions pursuant to 12 O.S. 2001 §2201(A) providing:

> "Judicial notice shall be taken by the court of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States."

See also, *Matter of McNeely, 1987 OK 19, ¶1,* 734 P.2d 1294.

[26] In the employees' brief filed on October 28, 2011, they maintain the same position on 12 O.S. Supp. 2006 §219A, see note 2, as this Court takes today. In Nitro-Lift's brief of October 31st, it continued to assert that the statutory provision was not for this Court to consider, but rather only for the arbitrator's application.

[27] *White v. Lim*, 2009 OK 79, ¶12, 224 P.3d 679; *Head v. McCracken*, 2004 OK 84, ¶13, 102 P.3d 670; *Balfour v. Nelson*, 1994 OK 249, ¶8, 890 P.2d 916, 39 A.L.R.5th 935.

[28] *Keating v. Edmondson*, 2001 OK 110, ¶8, 37 P.3d 882; *McSorley v. Hertz Corp.*, 1994 OK 120, ¶6, 885 P.2d 1343; *Oglesby v. Liberty Mut. Ins. Co.*, 1992 OK 61, ¶8, 832 P.2d 834.

[29] *Haney v. State*, 1993 OK 41, ¶5, 850 P.2d 1087, *Public Serv. Co. of Oklahoma v. State ex rel. Corp. Comm'n*, 1992 OK ¶8 842 P.2d 750.

what it expressed.[30] Statutes are interpreted to attain that purpose and end[31] championing the broad public policy purposes underlying them.[32] Only where the legislative intent cannot be ascertained from the statutory language, *i.e.* in cases of ambiguity or conflict, are rules of statutory construction employed.[33] If the language is plain and clearly expresses of the legislative will, further inquiry is unnecessary.[34]

¶20 Title 15 O.S. 2001 §219A is the Legislature's pronouncement on Oklahoma's public policy[35] regarding covenants not to compete. It provides that where an employee has executed a covenant not to

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[30] *Minie v. Hudson*, see note 37, supra; *Fuller v. Odom*, 1987 OK 64, ¶4, 741 P.2d 449; *Darnell v. Chrysler Corp.*, 1984 OK 57, ¶5, 687 P.2d 132.

[31] *Oklahoma Ass'n for Equitable Taxation v. City of Oklahoma City*, 1995 OK 62, ¶5, 901 P.2d 800, *cert. denied*, 516 U.S. 1029, 116 S.Ct. 674, 133 L.Ed.2d 523 (1995); *Wilson v. State of Oklahoma ex rel. Oklahoma Tax Comm'n*, 1979 OK 62, ¶5, 595 P.2d 1210.

[32] *Haggard v. Haggard*, 1998 OK 124, ¶1, 975 P.2d 439; *Price v. Southwestern Bell Tel. Co.*, 1991 OK 50, ¶7, 812 P.2d 1355.

[33] *State ex rel. Dept. of Human Serv. v. Colclazier*, 1997 OK 134, ¶9, 950 P.2d 824; *Matter of Estate of Flowers*, 1993 OK 19, ¶11, 848 P.2d 1146.

[34] *White v. Lim*, see note 27, supra; *Rout v. Crescent Public Works Auth.*, 1994 OK 85, ¶10, 878 P.2d 1045.

[35] The Legislature defines Oklahoma's public policy through its statutory enactments. See, *State ex rel. Henricksen v. State ex rel. Corp. Comm'n*, 2001 OK 89, ¶13, 37 P.3d 835; *Todd v. Frank's Tong Serv., Inc.*, 1989 OK 121, ¶12, 784 P.2d 47; *Mobbs v. City of Lehigh*, 1982 OK 149, ¶16, 655 P.2d 547, 31 A.L.R. 4th 1.

compete with an employer, the employee **"shall be permitted to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer."** The statute goes on to provide that any provision in a contract between an employer and an employee in conflict with the provisions of the section **"shall be void and unenforceable."**[36]

¶21 Subsection A utilizes the mandatory term, "shall,"[37] in association with the employee's right to engage in the same or similar business as that of the employer while subsection B provides that "any" provision in a contract between the employer and employee conflicting with those terms "shall be void and unenforceable." The term "any" is all-embracing and means nothing less than "every" and "all."[38] The

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[36] Title 15 O.S. 2001 §219A, see note 2, supra.

[37] Generally, the use of "shall" signifies a command. *City of Midwest City v. House of Realty, Inc.*, 2008 OK 28, fn. 5, 198 P.3d 886; *Zeier v. Zimmer, Inc.*, 2006 OK 98, ¶7, 152 P.3d 861; *Cox v. State ex rel. Oklahoma Dept. of Human Servs.*, 2004 OK 17, ¶21, 87 P.3d 607, *cert. denied*, ___ U.S. ___, 129 S.Ct. 2434, 174 L.Ed.2d 228 (2009). Nevertheless, there may be times when the term is permissive in nature. *City of Midwest City v. House of Realty, Inc.*, this note, supra; *Minie v. Hudson*, 1997 OK 26, ¶7, 934 P.2d 1082; *Texaco, Inc. v. City of Oklahoma City*, 1980 OK 169, ¶9, 619 P.3d 869.

[38] *JPMorgan Chase Bank v. Specialty Restaurants, Inc.*, 2010 OK

plain, clear, unmistakable, unambiguous, and unequivocal language of 15 O.S. 2001 §219A prohibits employers from binding employees to agreements which bar their ability to find gainful employment in the same business or industry as that of the employer.[39] The only exception allowed by the statutory provision is that the employee may be barred from soliciting goods or services from the employer's **established customers**.

¶22 The covenants not to compete contain provisions, for the period of two years, prohibiting the employees from accepting employment with any oil or gas entity located in the United States which generates five percent (5%) of its gross revenues from nitrogen generation. The same clause prevents the employees from: "owning, managing, operating, joining, controlling or participating" in a similar business; being a director, officer, representative, partner, or consultant in any business engaging in nitrogen generation; loaning money to a like enterprise; or selling or leasing equipment to any person or business which has any significant portion of its business as nitrogen generation, whether or not the equipment is related to that particular portion of the business. The covenant conceivably could be interpreted to prevent the employees from taking jobs in any capacity from a competing business, even one not directly related to the nitrogen generation process. The agreement not only bars active solicitation of

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65, ¶16, 243 P.3d 8; *State ex rel. Porter v. Ferrell*, 1998 OK 41, ¶9,959 P.2d 576.

[39] *Scanline Medical, LLC v. Brooks*, see note 42, infra.

current customers or suppliers of Nitro-Lift, it also forbids the employees from approaching past customers and suppliers. Furthermore, it operates to inhibit the employees from employing or engaging any Nitro-Lift officer or employee even where those individuals might seek employment on their own initiative rather than from any intervention by the employees.

¶23 The non-competition contracts go well beyond the bounds of what is allowable under §219A and violate the legislatively expressed public policy. Therefore, we hold that, pursuant to 15 O.S. 2001 §219A, the covenants not to compete are void and unenforceable as against Oklahoma's public policy expressed through legislative mandate.

¶24 c) Judicial modification of the covenant not to compete is inappropriate where, as here, the contractual provisions would have to be substantially excised, leaving only a shell of the original agreement, and would require the addition of at least one material term.

¶25 To bring the non-competition agreement within the bounds of what is allowable under 15 O.S. 2001 §219A, we would have to decimate its provisions. Essentially, subsections (k)(i) and (k)(iii) would have to be stricken in their entirety, leaving only subsection (k)(ii) relating to solicitation of past or present customers or suppliers of Nitro-Lift. However, that subsection also suffers shortcomings and infirmities.

¶26 Subsection (k)(ii) prohibits the employee from canvassing, soliciting, approaching or enticing away Nitro-Lift's **past** or present customers or suppliers.

Section 219A allows an employer to prohibit solicitation by an employee of "established customers," but it says nothing about barring purchases from an employer's suppliers. Undoubtedly, the Legislature, in utilizing the term "established customer," had in mind those businesses and customers wherein a relationship was ongoing and anticipated to continue into the future.[40] However, the non-competition agreement does not define what is a "**present** customer"[41] which might stretch to encompass temporary or single-event relationships.

¶27 The covenant not to compete contains a severability provision. Judicial modification is justified if the contractual defect can be cured by imposition of reasonable limitations concerning the activities embraced, time, or geographical limitations. Nevertheless, "there is more amiss here than can be reformed effectively."[42] Two of the three provisions of

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[40] Characterizing an established customer as one which the purchasers of a business would anticipate would continue to patronize the enterprise. See, *Bessemer Trust Co. v. Branin*, 618 F.3d 76 (2nd Cir. 2010); *Rice v. Hulsey*, 829 N.E.2d 87 (Ind.App. 2005); *Delta Resources, Inc. v. Harkin*, 118 A.D.2d 133, 506 NY.S.2d 695 (1986).

[41] In *Key Temporary Personnel, Inc. v. Cox*, 1994 OK CIV APP 123, 884 P.2d 1213, the Court of Civil Appeals determined that the modification of a contract to limit "clients" to "clients who remain Key clients" was not a substantial modification of the non-competition agreement. Nevertheless, in doing so, it differentiated the agreement under consideration from one in which other major modifications might be required.

[42] *Bayly,Martin & Fay, Inc. v. Pickard*, 1989 OK 122, ¶14, 780

the contract would require delineation in their entirety. To conform with the restrictions of 15 O.S. 2001 §219A, we would have to determine whether the phrase "present customers" within the agreement conformed to the Legislature's term "established customer," thereby supplying a material term of the contract. We would also be required to excise the portion of the subsection (k)(ii) relating to past customers and suppliers.

¶28 We will not reform a covenant not to compete so offensive that it would require us to supply material terms.[43] We hold that the breadth of the delineation required to bring the non-competition agreements into conformance[44] and the necessity of adding at least one material term to the contract prevents judicial modification.

CONCLUSION

¶29 Through the enactment of 15 O.S. 2001 §219A, the Legislature has expressed its intent with relation to the viability of covenants not to compete in the employment context. This Court does not extend its

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P.2d 1168; *Scaline Medical, LLC v. Brooks*, 2001 OK CIV APP 88, ¶32, 259 P.3d 911.

[43] *Bayly, Martin & Fay, Inc. v. Pickard*, see note 42, supra. See also, J. Boatman, "Contract Law: As Clear as Mud: The Demise of the Covenant not to Compete in Oklahoma," 2002 Okla.L.Rev. 491 (2002).

[44] This is not a situation where all the ills of the covenant not to compete may be cured by striking offending sections. See, *Cardiovascular Surgical Specialists Corp.* v. *Mammana*, 2002 OK 27, 61 P.3d 210.

auspices, in determining the validity of a statute, to consider its propriety, desirability, wisdom and practicability. These matters are left to the legislative department.[45] To do so here would be especially egregious. The Legislature used mandatory directives in 15 O.S. 2001 §219A regarding the boundaries of any non-competition agreement extracted as a condition of employment. In doing so, it utilized plain, clear, unmistakable, unambiguous, and unequivocal language leaving no room for judicial interpretation.

¶30 In conformance with our prior jurisprudence, we hold that the existence of an arbitration agreement in any employment contract does not prohibit judicial review of the underlying agreement. As drafted, we determine that the non-competition covenants are void and unenforceable as against Oklahoma's public policy as expressed by the Legislature's enactment of 15 O.S. 2001 §219A. Finally, because judicial modification cannot be accomplished without rewriting the agreement to cure multiple defects, leaving only a shell of the original agreement, and would require the addition of at least one material term, it is inappropriate.

¶31 Discretion is abused, so as to warrant reversal, when a trial judge makes a clearly erroneous conclusion and judgment, against reason and the evidence.[46] On this record, we are constrained to hold

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[45] *Keating v. Edmondson*, see note 28, infra. See also, *State ex rel. Cartwright v. Dunbar*, 1980 OK 15, ¶8, 618 P.2d 900; *Tate v. Logan*, 1961 OK 136, ¶0, 362 P.2d 670.

[46] *Spencer v. Oklahoma Gas & Elec. Co.*, see note 13, supra; *Tibbets v. Sight 'n Sound Appliance Ctrs.*, 2003 OK 72, ¶3, 77 P.3d

that the lifting of the temporary injunction and the failure to grant the employees permanent relief was without a basis in law, reason, or evidence and an abuse of discretion. The cause is reversed and remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

ALL JUSTICES CONCUR.

1042; *Finnel v. Seismic*, 2003 OK 35, ¶8, 67 P.3d 339; *Green Bay Packaging, Inc. v. Preferred Packaging, Inc.*, 1996 OK 121, ¶32, 932 P.2d 1091.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

2011 OK 98

No. 109,003

[Filed October 19, 2011]

EDDIE LEE HOWARD and SHANE D. SCHNEIDER,	)
Plaintiffs/Appellants,	)
v.	)
NITRO-LIFT TECHNOLOGIES, L.L.C.,	)
Defendant/Appellee.	)

ORDER

We granted the plaintiffs'/appellants' motion to retain the above styled and numbered cause on January 19, 2011. Essentially, the basis for the request was to determine whether Oklahoma's public policy prohibited enforcement of a covenant not to compete in an employment agreement providing that arbitration should take place in another jurisdiction

with the application of yet a different state law. Neither of the parties addressed the effect that 15 O.S. 2001 §219A, specifically addressing the acceptable ambit of covenants not to compete in the employment relationship, might have upon the resolution of the cause.

The parties are hereby ordered to show cause why this matter should not be resolved by application of 15 O.S. 2001 §219A. The responses are to be filed simultaneously, within ten (10) days of the date this order is filed of record.

DONE BY ORDER OF THE SUPREME COURT THIS 18TH DAY OF OCTOBER, 2011.

/s/ Steven W. Taylor
CHIEF JUSTICE

APPENDIX C

IN THE DISTRICT COURT OF
JOHNSTON COUNTY
STATE OF OKLAHOMA

Case No: CJ-2010-57

[Filed November 23, 2010]

Eddie Lee Howard	)
Plaintiff,	)
	)
vs.	)
	)
Nitro-lift Technologies, Llc	)
Defendant.	)
	)

ORDER

This matter is before the court on a motion to dismiss. The parties have thoroughly briefed and argued the issue to this court and after consideration, this court finds as follows:

1. The Oklahoma statutory provision concerning restraint of trade at 15 O.S.271 is not absolute; the validity of any such restraint is determined by its reasonableness. Key Temporary personnel vs. Cox, Ok. App., 884 P2d 1213 (1994)

2. In Oklahoma, arbitration agreements are generally accepted, 12 O.S. 1851, et seq. and the role of the courts is limited to certain preliminary inquiries in the face of such an agreement, 12 O.S. 1857 (B). This determination by the court is a "gateway" question for the court to the binding effect of the arbitration clause, Oklahoma Oncology vs. US Oncology OK, 160 P3d 936 (2007). Generally, if an otherwise valid clause is not an unreasonable restraint the issues presented under the clause are for the arbitration.
3. In this instance the court here finds there is a valid arbitration clause. It is plainly stated and described in the agreement signed by the parties and the topics covered are reasonable, in that the Defendant in this matter has a legitimate interest in the protection of its confidentialities and proprietary matters. Further the non-competition provision which is designed to prevent competitors from obtaining the benefit of specialized training and knowledge imparted to its employees is likewise reasonable and is restricted to a two (2) year period in application. Finally the poison providing that the employees may not for two (2) years after termination with Nitro-lift solicit or influence any person to terminate employment with Nitro-lift is also reasonable.
4. Although in its argument the plaintiffs suggest they might present a "fraud in the inducement" to This arbitration clause, none was presented here and no finding is entered in that regard
5. This court finding the arbitration agreement is valid on its face and reasonable in its terms and scope the Temporary Restraining Order sought by

the Plaintiffs is denied and the Motion to Dismiss of the Defendant company is granted.

Ordered this 23rd day of November, 2010.

/s/_____

THE HONORABLE ROBERT M. HIGHSMITH

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

2011 OK 98

No. 109,003

[Filed February 13, 2012]

EDDIE LEE HOWARD and SHANE D. SCHNEIDER,	)
Plaintiffs/Appellants,	)
v.	)
NITRO-LIFT TECHNOLOGIES, L.L.C.,	)
Defendant/Appellee.	)

ORDER

It is hereby ordered that petition for clarification and/or rehearing filed by the defendant/appellee is denied. Because this was not a proceeding to enforce an arbitration award, the plaintiff/appellants application for attorney fees is also denied. The appeal

related costs of $483.99 are, however, awarded to the plaintiff/appellants. 12 O.S. 2001 §978; Rules 1.14 and 1.36, Oklahoma Supreme Court Rules, 12 O.S. 2011, Ch. 15 App. 1.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 13TH DAY OF FEBRUARY, 2012.

/s/ Steven W. Taylor
CHIEF JUSTICE
ALL JUSTICES CONCUR

OPPOSITION BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 15 2012
OFFICE OF THE CLERK

No. 11-1377

IN THE
Supreme Court of the United States

NITRO-LIFT TECHNOLOGIES, L.L.C.,

Petitioner,

v.

EDDIE LEE HOWARD and
SHANE D. SCHNEIDER,

Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court has jurisdiction to review a state supreme court decision construing only state law when all parties argued before that court that state law applied to the issues in this case and no party claimed that federal law applied until after the state supreme court ruled based on Oklahoma law.

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INTRODUCTION

This case involves a decision by the Oklahoma Supreme Court construing Oklahoma law. Petitioner would have this Court believe that the Oklahoma Supreme Court ignored the decisions of this Court construing the Federal Arbitration Act ("FAA"). The application of the FAA, however, was not presented to the Oklahoma Supreme Court until after that court had already ruled on the merits based on state law. At every level of this proceeding, Petitioner argued that state law (namely, the Oklahoma Uniform Arbitration Act) applied to the arbitration clause in this case. This Court has no jurisdiction over the petition because no federal law issues were decided below or preserved by the Petitioner for review.

STATEMENT

Petitioner paints a misleading picture for the Court. Eddie Howard and Shane Schneider are not sophisticated professional employees. Respondents are oil field workers. Their primary duties, while employed with Petitioner, were to watch the gauges on a truck in the oil field. Neither employee has a college degree or specialized certificate because their job with Petitioner did not require it. Neither employee received any specialized training or confidential information from Petitioner because their job with the Petitioner did not require it.

Both of the Respondent employees are Oklahoma residents. They both applied for a job at Petitioner's offices in Tishomingo, Oklahoma, and during their employment, they worked primarily in Oklahoma. *See Verified Application for Temporary Restraining Order and Temporary Injunction and Supporting*

Brief and Supporting Affidavits of Eddie Howard at ¶1-8 and Shane Schneider at ¶¶1-8 (October 14, 2010).

Petitioner required its employees to sign a form entitled "Confidentiality/Non-Compete Agreement" ("agreement"), which does not reference the FAA, and prohibits the employees: (1) from working for a competitor anywhere in the world for a period of two-years following termination of employment, (2) from soliciting Petitioner's employees and customers for a competitor or supplier, and (3) from loaning money to a business engaged in the same business as Petitioner.[1] The agreement states that Louisiana law applies to the employment relationship and that disputes regarding the agreement must be submitted by employees to arbitration in Houston, Texas, over 300 miles away from Respondents' homes in Oklahoma. The agreement also allows Petitioner to file claims against employees in court. *Application for Temporary Restraining Order, Temporary Injunction and Supporting Brief and Supporting Affidavit of Eddie Howard and Shane Schneider* (October 14, 2010).

Because of a dispute concerning work hours and pay, Respondents quit their jobs with Petitioner and went to work for a competitor who paid overtime.

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[1] Eddie Howard left his employment with Petitioner and when he was re-hired by Petitioner a short time later, he did not sign a new agreement. *Application for Temporary Restraining Order, Temporary Injunction, Supporting Brief, and Supporting Affidavit of Eddie Howard at ¶5.* (October 14, 2010). There is an unresolved issue as to whether an employee is bound by a document signed during a previous term of his employment.

Petitioner filed an arbitration proceeding in Houston, Texas, pursuant to the Commercial Rules of Arbitration of the American Arbitration Association. Respondents dispute the unverified facts alleged by Petitioner, including but not limited to the allegation that it paid all of the arbitration fees. In response, Respondents filed a Petition for Declaratory Judgment and Application for Temporary Restraining Order and Temporary Injunction in the District Court of Johnston County, Oklahoma, seeking to enjoin Petition from proceeding with the arbitration. *Petition for Declaratory Judgment, Application for Temporary Restraining Order and Temporary Injunction and Supporting Brief* (Oct. 14, 2010).

Initially, the District Court granted a temporary restraining order staying the arbitration. After hearing arguments of counsel, the District Court denied the temporary injunction, finding that the noncompete agreement was reasonable and the arbitration agreement was valid under state law. *Order of the District Court of Johnston County, Oklahoma* (Nov. 23, 2010). Respondents appealed to the Oklahoma Supreme Court. The Oklahoma Supreme Court held as a matter of Oklahoma law that the fact that the agreement contained an arbitration clause did not, under Oklahoma's Uniform Arbitration Act, prevent the Oklahoma Supreme Court from reviewing the validity of the agreement, and in doing so, found that the noncompete agreement was void and unenforceable as against the public policy of the State of Oklahoma as articulated by the Oklahoma Legislature in 15 O.S §219A. This holding was premised on the Petitioner's own arguments that the arbitration clause was governed by state law. Because no federal issues were argued, the Oklahoma Su-

preme Court based its ruling on both the effect of the arbitration clause and the underlying agreement on Oklahoma law.

The Oklahoma Supreme Court's ruling that the agreement was void rested on the Oklahoma Legislature's clear declaration of Oklahoma public policy as related to noncompetition and non-solicitation agreements in 15 O.S. § 219A:

> A. A person who makes an agreement with an employer, whether in writing or verbally, not to compete with the employer after the employment relationship has been terminated, shall be permitted to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer.
>
> B. Any provision in a contract between an employer and an employee in conflict with the provisions of this section shall be void and unenforceable.

15 O.S. §219A.

REASONS FOR DENYING THE WRIT

I. No Federal Question Is Properly Presented by This Case Because No Issue of Federal Law Was Decided by, or Properly Raised Before, the Oklahoma Supreme Court.

The Petition for Certiorari should be denied because there is no federal question for this Court to review. The Federal Arbitration Act, 9 U.S.C. §1, *et seq.* ("FAA") was not raised by the Petitioner until after the Oklahoma Supreme Court decided the appeal on the merits of the state law issues. Only after the Supreme Court had issued a decision on the merits did the Petitioner, as part of a petition for rehearing, raise the FAA. This Court has stated on numerous occasions that it has no jurisdiction unless a federal question has been both raised and decided in the state court below. *Safeway Stores, Inc., v. Oklahoma Retail Grocers Assn., Inc.*, 360 U.S. 334, 342 at n. 7 (1959) ("The United States Supreme Court will not decide an issue raised for the first time on review of a state court decision). This Court does not review state court decisions in circumstances, like this case, when the federal law was not invoked or briefed by the parties, or addressed by the state court below. "[T]his rule applies whether the state law ground is substantive or procedural." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). Moreover, in a case like the instant case, on direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. *Herndon v. Georgia*, 295 U.S. 441 (1935). ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its

views of federal laws, our review could amount to nothing more than an advisory opinion.") *Herb v. Pitcairn*, 324 U.S. 117 (1945).

In the Oklahoma District Court, Petitioner began by arguing that Oklahoma law, including the Oklahoma Uniform Arbitration Act, 12 O.S. §1851 *et seq.*, and Oklahoma cases construing the Oklahoma statute, applied to the arbitration clause in this case. *See Defendant Nitro-Lift Technologies, L.L.C.'s Brief in Support of its Motion to Dismiss* (Nov. 9, 2012). Petitioner next argued that either the Oklahoma or Louisiana Uniform Arbitration Act, La. Rev. Stat. §9:4201 *et seq.* applied. In the briefing in the District Court, Petitioner argued, "Whether the court applies Oklahoma law or Louisiana law to the issues before it the outcome should be the same." Petitioner cited United States Supreme Court decisions, *only as guidance* in construing the state arbitration acts, stating, "Louisiana courts will look to federal law to interpret the Louisiana Arbitration Law, since it is substantially identical to the UAA." *Defendant Nitro-Lift Technologies, L.L.C.'s Supplemental Brief in Support of its Motion to Dismiss, pp. 1 (Nov. 22, 2010).*[2]

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[2] Petitioner filed three briefs at the District Court level (1) *Nitro-Lift's Response to Application for Temporary Restraining Order and Temporary Injunction and Brief in Support* (Nov. 9, 2010) (2) *Nitro-Lift Technologies, L.L.C.'s Motion to Dismiss and Brief in Support* (Nov. 9, 2010), and (3) *Nitro-Lift Technologies, L.L.C.'s Supplemental Brief in Support of its Motion to Dismiss* (Nov. 22, 2010). Each pleading urged the court to follow Oklahoma or Louisiana law to interpret the arbitration provision.

At the hearing on November 23, 2011, Petitioner again invoked only state law, stating, "We submitted a supplemental brief to you regarding the applicable Louisiana law which is, in essence, identical to Oklahoma law that applies to arbitration." *Transcript of Hearing before the Hon. Robert Highsmith, Johnston County, District Court, State of Oklahoma, pp. 15*, ls. 18-22 (Nov. 23, 2010). In sum, Petitioner's overriding theme in the District Court was that either Oklahoma law or Louisiana law applied to this case.

In the Oklahoma Supreme Court, Petitioner again filed pleadings and briefs asserting that state law applied to the agreement. Up to the moment the Oklahoma Supreme Court issued its decision, Petitioner did not once assert that the FAA applied to the arbitration clause in this case or otherwise seek to invoke federal law as the basis for its assertion that the question whether the agreement was void must be decided in arbitration rather than by the court. Instead, Petitioner consistently argued that the state arbitration laws of Oklahoma or Louisiana required that result. *Nitro-Lift's Response to Petition for Certiorari before the Oklahoma Supreme Court* and *Brief to Show Cause Regarding Application* of 15 O.S. 2001 §219A (Oct. 31, 2011).

As a result of Petitioner's framing of the issue, the Oklahoma Supreme Court decision did not purport to construe the FAA and did not even determine the

proprietary of arbitration under state law.[3] Instead, the Oklahoma Supreme Court reasoned that it did not need to reach that issue because it found that the underlying non-competition covenants "void and unenforceable as against Oklahoma's public policy expressed by the Legislature's enactment of 15 O.S. §219A". *Howard v. Nitro-Lift Tech., L.L.C.*, 273 P.3d 20. Thus, the Oklahoma Supreme Court concluded that determining the validity of the arbitration provision would represent purely "an advisory opinion." *Howard v. Nitro-Lift Tech., L.L.C.*, 273 P.3d 20, 23 at n. 1.

The only arbitration issue raised was whether Oklahoma's Uniform Arbitration Act precluded a state court from determining the validity of the agreement to be arbitrated. *Howard*, 273 P.3d 20, 26 at n. 19. While the Oklahoma Supreme Court considered FAA cases in construing how the Oklahoma Uniform Arbitration Act should be applied, the Oklahoma Supreme Court expressly stated that it was merely considering, not applying or construing, FAA precedent when it determined, based on established Oklahoma precedents, that it would not construe its own Arbitration Act in the same way this Court construed the FAA in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006):

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[3] The Court initially retained jurisdiction "[t]o determine whether Oklahoma's public policy prohibited enforcement of an employment agreement providing that arbitration should take place in another jurisdiction with the application of yet a different state's law." *Howard v. Nitro-Lift Tech., L.L.C.*, 273 P.3d 20, 23 at n. 1.

> In reaching our decision today, we consider extant federal and state precedent. Nevertheless, our determination rests squarely within Oklahoma law which provides bona fide, separate, adequate, and independent grounds for our decision. *Michigan v. Long*, 463 U.S. 1032 (1983).

Howard, 273 P.3d 20, 23 at n. 5.

State courts are under no obligation to interpret their own arbitration statutes in the same way this Court has construed the FAA, nor are they foreclosed from applying state arbitration statutes when parties have chosen to rely on them instead of on the FAA. This Court recognized in *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1988), that parties to an arbitration agreement do not have to use the FAA to carry out agreements to arbitrate and may instead rely on state laws to govern the procedures under which arbitration agreements will be enforced (or not enforced):

> Just as they may limit by contract the issues which they will arbitrate, see *Mitsubishi*, supra at 628, so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitra-

> tion is stayed where the [FAA] would otherwise permit it to go forward.

Volt Info. Sciences, Inc. v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477; *see also Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, (1995) (The FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties).[4]

Thus, the Oklahoma Supreme Court's decision rests solely on state law; therefore, it does not present a federal question or any question within the jurisdiction of this Court. *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945) ("[since] the [State] Supreme Court did not pass on the question, we may not do so."); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Crowell v. Randell*, 35 U.S. 368 (1836); *McGoldrick v. Compagnie Generale Transatlantic*, 309 U.S. 430, 434-435 (1940) ("in the

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[4] Petitioner's failure to argue the applicability of the FAA and its reliance on state arbitration laws was not necessarily a mere oversight. Petitioner apparently believes that Respondents are exempt from the FLSA under the Federal Motor Carrier Act as workers employed in connection with interstate operation of motor vehicles. If that were the case, their employment contracts would not be subject to the FAA, which excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1. This Court held in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001), that this provision "exempts from the FAA . . . contracts of employment of transportation workers." Petitioner's theory that it was not required to pay overtime to Respondents is thus flatly at odds with its belated reliance in this case on the FAA, and consistent with its initial approach of relying solely on state arbitration laws as authority for the enforcement of its arbitration agreement.

exercise of its appellate jurisdiction . . . [i]n cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review.").

The record before this Court shows that the Oklahoma Supreme Court was not called upon to construe or apply federal law until after it already reached its decision on independent state law grounds. Only after receiving an unfavorable opinion did Petitioners decide to try a new tactic and claim that federal law applied to the arbitration clause and that the FAA precluded the Oklahoma courts from addressing the validity of the agreement. In doing so, Petitioner asked the Oklahoma Supreme Court to rule on an issue that Petitioner had not previously briefed or presented to that court or to the trial court.

In Oklahoma, however, a party seeking a rehearing cannot make a new claim if the argument could have been raised before the appeal was resolved. In that regard, the Oklahoma Supreme Court has stated, "[i]n civil cases it is a well recognized rule that questions not advanced on the original hearing will not be considered on petition for rehearing, except in unusual circumstances or where fundamental or jurisdictional error is involved." *Pointer v. Hill*, 536 P.2d 358,361 (Okla. 1975); *see Pirrong v. Pirrong*, 552 P.2d 383 (Okla. 1976) (denying rehearing because the allegation of discrimination was not raised in the original hearing). Furthermore, a petition for rehearing is not granted for presenting points which the "losing party overlooked, misapprehended, or failed to fully address." *Tomahawk Resources, Inc. v.*

Craven, 130 P.3d 222, 225 (Okla. 2005); *see also Adams v. Robertson*, 520 U.S. 83, 86-87 (1997). ("When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented."). The Oklahoma Supreme Court's denial of rehearing did not comment on the federal-law issue Petitioner belatedly sought to raise; thus, it cannot be interpreted as having decided that issue.

II. Even if the FAA Were Implicated, this Court Would Still Have to Remand to the Oklahoma Supreme Court to Determine the Validity of the Arbitration Agreement.

Although Respondents maintain that there is no federal question to support this Court's jurisdiction, as a matter of caution, Respondents must point out that even if the FAA had been properly invoked, the Oklahoma Supreme Court would clearly still have jurisdiction to determine the validity of the arbitration agreement. Under the FAA, 9 U.S.C. §2, arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." "If a party challenges the validity under §2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under §4." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. __, 130 S. Ct. 2772, 2779-2780 (2010).

Arbitration clauses are like any other contract and "may be invalidated by general applicable contract defenses such as fraud, duress, or unconscionability." *Doctors Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). This is an issue for the court to decide.

Even though parties can delegate to the arbitrator the authority to determine this issue, this Court has clearly stated that "courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e] evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *AT & T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 649 (1986) (Unless the parties "clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.").

Rent-A Center v. Jackson contained specific language delegating to the arbitrator the exclusive authority to resolve any dispute related to the enforceability of the arbitration agreement, 561 U.S. __, 130 S. C. 2772, 2777. Unlike the circumstances in *Rent-A-Center*, the arbitration clause here does not provide that issues of enforceability are to be decided by the arbitrator. Accordingly, because the arbitration clause did not reserve to the arbitrator the issues of enforceability or validity, the enforceability of the arbitration clause is itself subject to judicial review by the Oklahoma Supreme Court.

Respondents argued in the District Court and on appeal that the arbitration agreement itself was unconscionable because of the forum selection clause, the choice of Louisiana law, the unilateral right of Petitioner to file in court as well as the substantial cost involved to Respondents (especially when imposed on hourly workers). Additionally, Eddie Howard's affidavit shows that Petitioner's representative's misrepresented the terms of the Agreement when presented to him during his first term of employment. *See Petition for Declaratory Judgment, Re-*

sponse to Motion to Dismiss, and Verified Application for Temporary Restraining Order and Temporary Injunction and Supporting Brief and Supporting Affidavits of Eddie Howard at ¶1-12 and Shane Schneider at ¶¶1-12 (October 14, 2010).

Without ruling, the Oklahoma Supreme Court recognized that a forum selection cause may be unconscionable and in doing so, stated:

> [A] forum selection clause [in an arbitration agreement] may be so unreasonable that it will be gravely difficult and inconvenient resulting in a party being deprived of a day in court. If so, it could be declared unenforceable.

Howard, 273 P.3d 20, 22 at n. 1, *citing M/S Breman v. Zapata Off-Shore, Co.*, 407 U.S. 1 (1972).

Because the Oklahoma Supreme Court did not reach this issue (determining it was mooted by the substantive ruling), even if the Petitioner were correct, the matter would still have to be remanded to the Oklahoma Supreme Court for a determination on the merits of the validity of the arbitration clause itself because a court cannot conclude that a party truly agreed to arbitrate until it decides whether the agreement is unconscionable or not. The likelihood that the Oklahoma court would hold the arbitration clause unconscionable and would thus reach exactly the same result on remand provides an additional reason why review of the issue posed by the Petitioner (even if it were properly presented) does not rise to

the level of importance necessary to justify granting a writ of certiorari. [6]

Finally, Petitioners are incorrect in asserting that the Oklahoma Supreme Court's decision conflicts with *Marmet v. Health Care Ctr., Inc. v. Brown*, __ U.S. __, 132 S. Ct. 1201. *Marmet* held that if a state law prohibits outright the arbitration of a particular type of claim it is displaced by the FAA. *Id.* at 1203. The Oklahoma Court's decision relies on 15 O.S. §219A, which applies to all contracts. The statute does not single out or treat arbitration clauses differently; it treats an arbitration clause the same as any other contract. Section 219A does not even forbid arbitration of non-competition agreements; it merely declares when a non-competition agreement is or is not valid.

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[6] Moreover, the ultimate conclusion that the noncompete agreement at issue in this case is unenforceable under Oklahoma law, as the Oklahoma Supreme Court held, is so clear that even if that issue were sent to arbitration, any arbitrator who in good faith attempted to follow the law would have to hold the noncompete agreement unenforceable, rendering Petitioner's insistence on conducting an arbitration of the issue in a distant and inconvenient forum still more of a waste of time for all concerned, including this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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August 15, 2012

REPLY BRIEF

RECORD
AND
BRIEFS

No. 11-1377

In the Supreme Court of the United States

NITRO-LIFT TECHNOLOGIES, L.L.C.,
Petitioner,

v.

EDDIE LEE HOWARD and
SHANE D. SCHNEIDER,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondents' Opposition does not suggest that the Supreme Court of Oklahoma's decision is consistent with this Court's longstanding rule that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 445-46 (2006). The state court disregarded the arbitration agreement when it held that Oklahoma law and public policy invalidated the contract as a whole,[1] including the arbitration clause.

After first waiving its right to oppose the Petition, Respondents now argue the federal issue was not fairly raised by Nitro-Lift or resolved by the Oklahoma court. Respondents misstate the record and the decision below. The Oklahoma Supreme Court dispelled most of Respondents' arguments when it stated:

> Nitro-Lift argues that the issue of the validity of the covenants not to compete is for the arbitrator. **In doing so, the employers rely upon United States Supreme Court jurisprudence.**

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[1] Respondents' waiver argument is curious given the Oklahoma Supreme Court's opinion applying 15 O.S. § 219A was not based upon any arguments made by Respondents. *Okla. Sup. Ct. Order* (October 19, 2011) ("Neither of the parties addressed the effect that 15 O.S. 2001 § 219A . . .might have upon the resolution of the cause."). The Oklahoma Supreme Court *sua sponte* raised the issue. App. 4a n.1, *Howard v. Nitro-Lift Technologies, L.L.C.*, 273 P.3d 20, 26 (Okla. 2011).

App. 13a, 273 P.3d at 26 (emphasis supplied). The premise and holding of the Supreme Court cases cited by Nitro-Lift and discussed by the court involve the preemptive scope of the Federal Arbitration Act ("FAA"). Respondents attempt to recast this statement by the Oklahoma court to suggest that federal authority was cited "*only as guidance*." (Opp. P. 6). However, the lower court's own description of the case shows that it considered the same issue and argument Nitro-Lift raised in the Petition. Respondents' waiver argument is meritless.

I. The Oklahoma Supreme Court's Rejection Of Decades Of Federal Arbitration Jurisprudence Was Fairly Presented Below And Addressed By The State Court.

A federal issue conferring jurisdiction on the Court to review a state court decision under 28 U.S.C. § 1257(a) may arise if it "was either addressed by **or** properly presented to the state court that rendered the decision". *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (citing cases; emphasis supplied). In this case, the Court has jurisdiction because the state court directly addressed the federal issue and Nitro-Lift raised the issue below.

A. The Oklahoma Supreme Court Directly Addressed The Question Presented And Rejected This Court's Federal Arbitration Jurisprudence.

"There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436

(1959). "It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667-68 (1991) (citing cases).

Whether a federal issue was fairly raised in the lower court is a federal question. *Street v. New York*, 394 U.S. 576, 583 (1969). The state court may not evade review by labeling the decision as based on an adequate and independent state ground or by burying the federal issue in its opinion. "[A]mbiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Florida v. Powell*, 130 S. Ct. 1195, 1201 (2010). In *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), the Court held that when a state-court decision "fairly appears" to be "interwoven with the federal law," and "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," the Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it do so."[2]

The Oklahoma Supreme Court here acknowledged Nitro-Lift raised and argued federal authority from FAA arbitration decisions of this Court (App. 13a), and then it proceeded to reject those arguments. The court

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[2] "[W]hatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.).

discussed that it was rejecting the same case law and authority raised by Nitro-Lift in its Petition. App. 15a. The primary Oklahoma case upon which it relied has since been effectively overruled by this Court's decision in *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. __, 132 S. Ct. 1201 (2012) (per curiam) (summarily reversing enforcement of West Virginia statute barring arbitration in personal injury nursing home cases).

In rejecting application of the FAA and this Court's arbitration decisions, the Oklahoma decision states as follows:

> Most instructive on Nitro-Lift's arguments is *Bruner v. Timberlane Manor Ltd. P'ship*, 2006 OK 90, 155 P.3d 16. *Bruner* contains an exhaustive overview of the United States Supreme Court decisions construing the Federal Arbitration Act (Federal Act), 9 U.S.C. §§ 1, *et seq.* and state arbitration law. [FN20]. The **Supreme Court decisions** discussed therein, and relied upon by Nitro-Lift here, **were found not to inhibit our review of the underlying contract's validity.**[FN21].

App. 15a., 273 P.3d at 26 & nn. 20-21 (court's emphasis). The court's reference to *Bruner* and the accompanying footnotes dispel any notion that the Oklahoma Supreme Court failed to pass on Nitro-Lift's FAA preemption arguments.

In *Bruner*, the Oklahoma Supreme Court stated that the "**dispositive question on appeal is whether the Federal Arbitration Act applies to the nursing home's admission contract.**" 155 P.3d

at 19 (emphasis supplied). There, the court applied the Oklahoma Uniform Arbitration Act (OUAA) and conducted an analysis to determine whether the anti-arbitration provision in Oklahoma's Nursing Home Care Act was preempted by the FAA. Ultimately, the court concluded that the FAA was not applicable, primarily because it found nursing home admission contracts do not involve interstate commerce. *Id.* at pp. 21-31. As a secondary ruling, the *Bruner* court held that even if the nursing home contract did involve interstate commerce, the FAA's mandate (which would otherwise preempt the anti-arbitration act) was overridden by a contrary congressional command allowing states to create appeal procedures for nursing home transfers, 42 U.S.C. § 1396r(c)(2). *Id.* at pp. 31-32.

Of course, in *Marmet*, this Court, in a unanimous, *per curium* opinion, rejected a nearly identical anti-arbitration statute upheld by the West Virginia Supreme Court of Appeals on nearly identical bases as those relied upon in *Bruner*. 132 S. Ct. 1201-03. The only reasonable interpretation of the Oklahoma's court's focused reliance on *Bruner* here is that the court believed *Bruner's* FAA analysis was sufficient to defeat any reliance upon FAA preemption in this case. Merely because the court used the now-overruled decision in *Bruner* as a substitute for a more detailed FAA analysis does not mean that the federal issue addressed in Nitro-Lift's Petition for Certiorari was not fairly raised and addressed in this case.

Lest there be any doubt, in footnote 20 of the Oklahoma Supreme Court's decision here, the court found: "Among the cases discussed [in *Bruner*] are

three Supreme Court cases **on which the employers rely**: *Prima Paint Corp. v. Flood & Conklin Mfg. Co*, 388 U.S. 395 (1967); *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006); and *Southland Corp. v. Keating* 465 U.S. 1 (1984)." App. 15a n. 20, 273 P.3d at 26 n.20 (emphasis supplied). The court discussed the holding in *Prima Paint*. Each of these cases cited by the court addressed FAA preemption of state law limits on the arbitrability of a particular dispute. *Buckeye Check Cashing*, 546 U.S. at 444-448 ("severability" of contract and arbitration clause is federal substantive law and validity of underlying contract to be decided by arbitrator); *Southland Corp.*, 465 U.S. at 10-14 (FAA is federal substantive law "applicable in state and federal courts;" rejecting view that state law could bar enforcement of FAA even for state-law claims in state court); *Prima Paint*, 388 U.S. at 400-403 ("severability" is not a question of state law). The court in this case (and in *Bruner*) raised and passed on these core federal issues and thereby conferred jurisdiction on this Court.[3]

Further, in footnote 21, the court acknowledged that the FAA preempted and displaced anti-arbitration statutes. App. 15a n. 21, 273 P.3d at 26 n. 21. However, relying on *Bruner*, the court analogized this case to *Bruner* and found that the specific statute addressing "non-competition" agreements governed "over the more general statute favoring arbitration."

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[3] Where, as here, the state court's decision is preempted by the FAA and this Court's federal authority, simple logic precludes finding an adequate and independent state-law ground based on the very state-law authority that is preempted.

Id. at n. 21. In its motion to reconsider, Nitro-Lift asked the court to clarify whether it was referencing the FAA (which it was discussing at that point in the opinion) as the more general statute or another statute. *Defendant/Appellee Nitro-Lift Technologies, L.L.C.'s Pet. for Clarification And/Or Reh'g* at p. 3 (Dec. 12, 2011). However, the court refused to clarify this hopelessly ambiguous statement.[4]

The state supreme court in this case directly addressed and passed on the federal arbitration issue raised in the Petition and this Court has jurisdiction under 28 U.S.C. § 1257(a). Further, when, as here, the state court's decision relies upon its own cases, which, in turn, rely upon federal authorities, the cases are not being used merely as "guidance" and the state law is "interwoven with federal law" such that the "adequacy and independence of any possible state law ground is not clear from the face of the opinion." *See Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996). In these circumstances, the Court's jurisdiction is "secure." *Id.*

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[4] The Supremacy Clause preempts any state attempt to recognize a more specific statute as overriding established federal law. U.S. Const. Art. VI, cl. 2.

B. Nitro-Lift Fairly Raised And Preserved The Federal Issues.

Alternatively, Nitro-Lift fairly raised the federal issues in the lower courts. The Supreme Court of Oklahoma acknowledged as much when it stated that Nitro-Lift raised federal issues relating to the FAA and Supreme Court authority regarding the preemption of state law. App. 13a, 15a & nn. 20,21, 273 P.3d at 26 & nn. 20,21.

To preserve a federal issue,

> "[n]o particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

PruneYard Shipping Center v. Robins, 447 U.S. 74, 85 n.9 (1980)(quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)); *see also Eddings v. Okla.*, 455 U.S. 104, 113 n.9 (1982) ("jurisdiction does not depend on citation to book and verse.").

Respondents' contention that Nitro-Lift did not raise the federal issue until after the ruling by the Oklahoma Supreme Court is wrong. While Nitro-Lift cited the OUAA and the corresponding Louisiana arbitration act in the lower courts, Respondents' contention that Nitro-Lift only cited federal authority as "guidance" to interpret those statutes is not

supported by the record. Nitro-Lift made alternative arguments under each of these three sources to both the trial court and the state supreme court and specifically addressed the question presented in the Petition. In its first argument in response to Respondents' application for a temporary restraining order and temporary injunction, Nitro-Lift stated as follows:

> Plaintiffs incorrectly state that the validity of the Agreements must be determined as "an initial matter," and that "there is nothing to arbitrate if this Court finds that the non-compete provisions [are] void as a matter of law." In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the U.S. Supreme Court established three propositions concerning challenges to arbitration agreements. **First, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause alone, the issue of the contract's validity is to be considered by the arbitrator in the first instance. Third, this arbitration law applies in both state and federal courts**. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).
>
> Therefore, challenges to the validity of an entire contract, such as the challenge made by Plaintiffs in the present action, are to be considered by the arbitrator, not the Court. *Prima Paint*, 388 U.S. at 402; *Buckeye Check Cashing*, 546 U.S. at 1208-1209.

Defendant Nitro-Lift Technologies, L.L.C.'s Response to Application for Temporary Restraining Order and Temporary Injunction and Brief in Support, p. 4 (Nov. 9, 2010).

Nitro-Lift raised the same argument in its Motion to Dismiss before the trial court. *Defendant Nitro-Lift Technologies, L.L.C.'s Motion to Dismiss and Brief in Support*, p. 7 (Nov. 9, 2010). The state-court appeal proceeded under the expedited procedures of Okla. Supr. Ct. R. 1.36, which meant the parties' briefs in the trial court served as their briefs on appeal. When the Oklahoma Supreme Court *sua sponte* raised the application of 15 O.S. § 219A and requested briefing, Nitro-Lift addressed that issue and argued again that under *Prima Paint*, *Southland,* and *Buckeye Check Cashing*, these authorities applied in both state and federal courts and the decision was one for the arbitrator and not the court. *Nitro-Lift's Brief to Show Cause Regarding the Application of 15 O.S. 2001 § 219A*, p. 7 (Oct. 31, 2011).

Nitro-Lift repeatedly raised and argued below the very question presented to this Court for resolution. This Court has jurisdiction.

II. Other Issues Which May Require Further Consideration On Remand Are Not An Obstacle To Review.

Respondents contend that potential unconscionability litigation on remand is an obstacle to review. (Opp. pp. 12-13). Respondents also note that there may be an issue as to whether Howard had a second term of employment not covered by the

arbitration agreement. (Opp. p. 2 n. 1). If the potential for additional litigation on remand were an obstacle to review, this Court's certiorari jurisdiction would be uselessly narrow.

The possibility of post-remand validity litigation did not hinder this Court's review in *Perry v. Thomas*, 482 U.S. 483, 492 (1987). In *Perry*, the Court reversed the state court and held the FAA preempted the state statute. The Court declined to review Plaintiff's alternative arguments because they "may be resolved on remand". *Id.* at 492. Likewise, with regard to unconscionability, the court held that the "issue was not decided below . . . and may likewise be considered on remand." *Id.* at n. 9; *see also Doctor's Assocs. v. Casarotto*, 517 U.S. 68 (1996) (court held FAA preempted Montana notice provision notwithstanding contention that one petitioner was not entitled to enforce the arbitration provision); *KPMG LLP v. Cocchi*, 565 U.S. ___, 132 S. Ct. 23 (2011) (summary reversal of state court decision refusing to refer case to arbitration because two claims may not be arbitrable, and remanding to state court to decide the issue).

Respondent cannot prevent review of the facially erroneous decision of the Oklahoma court based upon speculation the court on remand might invalidate the arbitration provision on other grounds.

III. Conclusion

The question presented in the Petition was passed upon by the Oklahoma court and fairly raised by Nitro-Lift. This Court has jurisdiction under 28 U.S.C. § 1257(a).

This case is an ideal candidate for review and summary reversal. The Supreme Court of Oklahoma's repeated holding was extraordinarily broad: **"We determine that the existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement."** App. 6a, 16a, 273 P.3d at pp. 23, 27. (emphasis supplied). The court's decision cites and rejects this Court's FAA jurisprudence in reaching this decision and places great emphasis on its prior decision in *Bruner*, which has been summarily rejected by this Court in *Marmet*. Without corrective action from this Court, the Oklahoma decision will be cited and relied upon by parties to avoid arbitration in a wide variety of cases. The decision – if left unreviewed – will "encourage and reward forum shopping" contrary to the pronounced goals of the FAA. *See Southland*, 465 U.S. at 15; *see, e.g., Rainbow Health Care Ctr. v. Crutcher*, 07-cv-194-IHP, 2008 WL 268321 at *6 (N.D. Okla. Jan. 29, 2008) (rejecting *Bruner's* FAA analysis and enjoining state health care department from enforcing the anti-injunction provision in Oklahoma's Nursing Home Care Act).

The Petition for a Writ of Certiorari should be granted and the decision of the Oklahoma Supreme Court deserves summary reversal.

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